

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BOBBY JOE COX,
Plaintiff,
v.
T. SPENCER,
Defendant.

Case No. [16-cv-04036-PJH](#)

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND**

Plaintiff, a state prisoner, proceeds with a pro se civil rights complaint under 42 U.S.C. § 1983. The original complaint was dismissed with leave to amend and plaintiff has filed an amended complaint.

DISCUSSION

STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)

(citations omitted). Although in order to state a claim a complaint “does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. The United States Supreme Court has recently explained the “plausible on its face” standard of *Twombly*: “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged deprivation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

LEGAL CLAIMS

Plaintiff states that he received inadequate dental care.

Deliberate indifference to serious medical needs violates the Eighth Amendment’s proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A determination of “deliberate indifference” involves an examination of two elements: the seriousness of the prisoner's medical need and the nature of the defendant's response to that need. *Id.* at 1059.

A “serious” medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the “unnecessary and wanton infliction of pain.” *Id.* The existence of an injury that a reasonable doctor or patient would find important and

1 worthy of comment or treatment; the presence of a medical condition that significantly
2 affects an individual's daily activities; or the existence of chronic and substantial pain are
3 examples of indications that a prisoner has a "serious" need for medical treatment. *Id.* at
4 1059-60.

5 A prison official is deliberately indifferent if he or she knows that a prisoner faces a
6 substantial risk of serious harm and disregards that risk by failing to take reasonable
7 steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must
8 not only "be aware of facts from which the inference could be drawn that a substantial
9 risk of serious harm exists," but he "must also draw the inference." *Id.* If a prison official
10 should have been aware of the risk, but was not, then the official has not violated the
11 Eighth Amendment, no matter how severe the risk. *Gibson v. County of Washoe*, 290
12 F.3d 1175, 1188 (9th Cir. 2002). "A difference of opinion between a prisoner-patient and
13 prison medical authorities regarding treatment does not give rise to a § 1983 claim."
14 *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).

15 Plaintiff states that while incarcerated at California Institute for Men in Chino, CA
16 he was diagnosed with throat cancer. In April 2015 he underwent a right-side radical
17 tonsillectomy and biopsy. While waiting for the final pathology report, dentists at a prison
18 pulled out his teeth in preparation for radiation treatment. Plaintiff contends that the
19 surgery to remove the cancer was successful and the teeth were removed for no reason
20 because he did not need radiation treatment. He also argues that he was not provided a
21 proper diet after the teeth were pulled and he lost too much weight as a result.

22 In the amended complaint plaintiff has failed to identify the actions of any specific
23 defendant. The amended complaint is dismissed with leave to amend. Plaintiff must
24 describe the actions of the individual defendants and how they violated his constitutional
25 rights. It also appears that the events in this action occurred at California Institute for
26 Men which is location in the Central District of California. In an amended complaint
27 plaintiff must specify where the incident occurred.
28

1 **CONCLUSION**

2 1. The amended complaint is **DISMISSED** with leave to amend in accordance
3 with the standards set forth above. The second amended complaint must be filed no
4 later than **September 22, 2018**, and must include the caption and civil case number used
5 in this order and the words SECOND AMENDED COMPLAINT on the first page.
6 Because an amended complaint completely replaces the original complaint, plaintiff must
7 include in it all the claims he wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258,
8 1262 (9th Cir. 1992). He may not incorporate material from the original complaint by
9 reference.

10 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the
11 court informed of any change of address by filing a separate paper with the clerk headed
12 "Notice of Change of Address," and must comply with the court's orders in a timely
13 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
14 pursuant to Federal Rule of Civil Procedure 41(b).

15 **IT IS SO ORDERED.**

16 Dated: August 22, 2018

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18 _____
19 PHYLLIS J. HAMILTON
20 United States District Judge
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CERTIFICATE OF SERVICE


9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.
10 District Court, Northern District of California.

11
12 That on August 22, 2018, I SERVED a true and correct copy(ies) of the attached, by
13 placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
14 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
15 receptacle located in the Clerk's office.
16

17 Bobby Joe Cox ID: BC4369
18 Folsom State Prison Housing: B1-D2-31
19 P.O. Box 950
20 Folsom, CA 95763

21 Dated: August 22, 2018

22
23 Susan Y. Soong
24 Clerk, United States District Court

25 By: 
26 Kelly Collins, Deputy Clerk to the
27 Honorable PHYLLIS J. HAMILTON
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